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Mas Anita bt Abdullah v Lew Wai Koung (No 2)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-306–03 OF 2012
YEOH WEE SIAM J
4 DECEMBER 2012

C

Civil Procedure — Enforcement — Possession of immovable property — Recovery of vacant possession of premises by landlord — Judgment for vacant possession obtained by landlord — Premises in abandoned state — Whether writ of possession required by landlord to recover vacant possession of premises — Rules of Court 2012 O 45 r 3

D

Land Law — Tenancy — Forfeiture of tenancy — Powers of re-entry — Recovery of vacant possession of premises by landlord — Judgment for vacant possession obtained by landlord — Premises in abandoned state — Whether writ of possession required by landlord to recover — Whether landlord can recover possession under s 234(2) of the National Land Code

E

Landlord and Tenant — Tenancy — Breach of — Non-payment of rental — Recovery of vacant possession of premises by landlord — Judgment for vacant possession obtained by landlord — Premises in abandoned state — Whether writ of possession required by landlord to recover vacant possession of premises — Whether landlord can recover possession under s 234(2) of the National Land Code — Rules of Court 2012 O 45 r 3

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On 13 September 2011 the defendant obtained a judgment in default against the plaintiff in the sessions court ('the judgment') for arrears in rental and vacant possession of the premises tenanted by him to the plaintiff ('the premises'). The judgment was served on the plaintiff on 14 October 2011. The defendant went to the premises in early October 2011 and found the premises were locked. The neighbours informed the defendant that the plaintiff was seen leaving the premises with her big bag sometime in September 2011 and she did not return to the premises. By a letter dated 14 October 2011 the defendant gave the plaintiff seven days' notice before re-entry into the premises. The defendant lodged a police report and on 21 October 2011, accompanied by some police officers, he took vacant possession of the premises. The defendant found the premises to be in an abandoned state. The plaintiff then commenced this application. The issue to be determined was whether a writ of possession was required by the defendant to get vacant possession of the property. The plaintiff contended that under O 45 r 3 of the Rules of Court 2012 ('O 45 r 3'),

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a writ of possession was required before the defendant could recover vacant possession. The defendant contended that a writ of possession under O 45 r 3 was not required since he proceeded under s 234(2) of the National Land Code ('NLC'). A

Held: B

(1) Order 45 r 3(1) uses the word 'may' and not 'shall'. This means that there may be more than the one or two ways provided in O 45 r 3(1) for the defendant to enforce the judgment for possession of his immovable property. It is therefore open to the defendant to elect whether to enforce the judgment under O 45 r 3 or by other means (see para 19). C

(2) The defendant elected not to apply for a writ of possession under O 45 r 3 but instead elected to proceed under s 234(2) of the NLC. As stated in s 234(2) of the NLC, the defendant's re-entry onto the land is subject to the provisions of any other written law for the time being in force. In this case, the other written laws which were relevant were the ROC and the Specific Relief Act 1950 ('SRA'). Order 45 r 3 did not make it mandatory for the defendant to enforce the judgment under that provision and to obtain a writ of possession. Section 7(2) of the SRA must be read together with s 7(3) of the same. This means that if the tenancy is determined or has come to an end, and if the occupier continues to remain in occupation of the property lawfully, then the defendant shall not be entitled to possession of the property without court proceedings and getting a court order. However, in this case, the defendant had already obtained the judgment against the plaintiff, and the tenancy has been terminated. Therefore, since the plaintiff was not a lawful occupier at the material time under s 7(3) of the SRA, it followed that s 7(2) could not be invoked by the plaintiff (see paras 20–21). D E F

(3) The defendant was not required to get a court order or a writ of possession before re-entry into the premises (see para 21). G

[Bahasa Malaysia summary

Pada 13 September 2011 defendan memperolehi penghakiman ingkar terhadap plaintif di mahkamah sesyen ('penghakiman tersebut') untuk sewa tertunggak dan milikan kosong premis-premis yang disewakannya kepada plaintif ('premis tersebut'). Penghakiman tersebut diserahkan ke atas plaintif pada 14 Oktober 2011. Defendan pergi ke premis tersebut pada awal Oktober 2011 dan mendapati premis tersebut dikunci. Jiran-jiran memberitahu defendan yang plaintif dilihat meninggalkan premis tersebut dengan beg besarnya pada bulan September 2011 dan dia tidak kembali ke premis tersebut. Melalui surat bertarikh 14 Oktober 2011 defendan memberikan plaintif notis tujuh hari sebelum masuk semula ke premis tersebut. Defendan membuat laporan polis dan pada 21 Oktober 2011, diiringi oleh beberapa pegawai polis, H I

dia mengambil milikan kosong premis tersebut. Defendan mendapati premis tersebut dalam keadaan terbiar. Plaintif kemudiannya memulakan permohonan ini. Isu untuk ditentukan adalah sama ada writ pemilikan diperlukan oleh defendan untuk mendapatkan milikan kosong hartanah tersebut. Plaintif berhujah bahawa di bawah A 45 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM')('A 45 k 3'), writ pemilikan diperlukan sebelum defendan dapat mendapatkan semula milikan kosong. Defendan berhujah bahawa writ pemilikan di bawah A 45 k 3 tidak diperlukan memandangkan dia memulakan tindakan di bawah s 234(2) Kanun Tanah Negara ('KTN').

Diputuskan:

(1) Aturan 45 k 3(1) menggunakan perkataan 'may' dan bukan 'shall'. Ini bermaksud bahawa mungkin terdapat lebih dari satu atau dua cara yang diperuntukkan di dalam A 45 k 3(1) untuk defendan menguatkuasakan penghakiman untuk milikan harta tak alihnya. Oleh itu ia terbuka kepada defendan untuk memilih sama ada untuk menguatkuasakan penghakiman di bawah A 45 k 3 atau dengan cara lain (lihat perenggan 19).

(2) Defendan memilih untuk tidak memohon writ pemilikan di bawah A 45 r 3 tetapi sebaliknya memilih untuk meneruskan tindakan di bawah s 234(2) KTN. Seperti yang dinyatakan di dalam s 234(2) KTN, kemasukan semula defendan ke premis tersebut adalah tertakluk kepada peruntukan-peruntukan apa-apa undang-undang bertulis yang lain pada masa dalam pertimbangan. Dalam kes ini, undang-undang bertulis yang lain yang relevan adalah KKM dan Akta Relief Spesifik 1950 ('ARS'). Aturan 45 k 3 tidak membuatkannya mandatori untuk defendan menguatkuasakan penghakiman di bawah peruntukan tersebut dan untuk mendapatkan writ pemilikan. Seksyen 7(2) ARS mesti dibaca bersama dengan s 7(3) Akta yang sama. Ini bermaksud bahawa jika penyewaan telah ditentukan atau telah sampai kepenghujungnya, dan jika penghuni terus tinggal mendiami hartanah secara sah, dengan itu defendan tidak berhak untuk mengambil milikan hartanah tersebut tanpa prosiding mahkamah dan mendapatkan perintah mahkamah. Walau bagaimanapun dalam kes ini, defendan telah mendapatkan penghakiman terhadap plaintif, dan penyewaan tersebut telah ditamatkan. Oleh itu, memandangkan plaintif bukan penghuni sah di sisi undang-undang pada masa material di bawah s 7(3) ARS, berikutan tersebut s 7(2) tidak boleh dibangkitkan oleh plaintif (lihat perenggan 20–21).

(3) Defendan tidak perlu mendapatkan perintah mahkamah atau writ pemilikan sebelum masuk semula ke dalam premis tersebut (lihat perenggan 21).]

Legislation referred to

National Land Code s 234, 234(2)
Rules of Court 2012 O 14A, O 45 rr 3, 3(1), (a), (b), 5
Specific Relief Act 1950 s 7, 7(2), (3)

Vincent Tey Wei Seng (Lainah Yaacob & Zulkepli) for the defendant.
Yau Lap Ho (Yap Lap Ho & Co) for the plaintiff.

Yeoh Wee Siam J:

BRIEF FACTS

[1] On 13 September 2011 the defendant obtained a judgment in default against the plaintiff in the Kuala Lumpur Sessions Court Summons No 52–16151 of 2011 ('the judgment') for arrears in rental at RM750 per month amounting to RM6,759, interest at 8%pa, costs of RM408 and vacant possession of the premises tenanted by him to the plaintiff ('the premises').

[2] The judgment was served on the plaintiff on 14 October 2011 by a letter of the defendant's solicitors dated the same day.

[3] The defendant went to the premises to look for the plaintiff in early October 2011 and found that the premises were locked. The neighbours informed the defendant that the plaintiff was seen leaving the premises with her big bag sometime in September 2011 and she did not return to the premises.

[4] By a letter dated 14 October 2011 the defendant gave the plaintiff seven days' notice before re-entry into the premises.

[5] The defendant lodged a police report and on 21 October 2011, accompanied by some police officers, he took vacant possession of the premises. The defendant found the premises to be in an abandoned state eg the food had perished, the refrigerator was dirty etc. Some photographs were taken of the place which was in a mess.

ENCLOSURE 19

[6] This is the plaintiff's application for the following orders:

(a) this action be decided under O 14A of the Rules of Court 2012 ('the ROC') ie whether a writ of possession is required to get vacant possession of the property in this action;

(b) costs of the application be costs in the cause; and

(c) other reliefs as deemed just and fair.

THE COURT'S DECISION GIVEN AN 14 NOVEMBER 2012 REGARDING ENCL 19

[7] The court holds that the defendant is not required to apply for the writ of possession under O 45 r 3 of the ROC.

[8] Cost of RM3,000 are to be paid by the plaintiff to the defendant forthwith.

[9] However, in respect of the plaintiff's claim for the loss of her personal possessions, the court grants liberty to the plaintiff to file a notice of application to prove her losses, and for assessment of damages, if any.

APPEAL

[10] The appeal by the plaintiff is against part of the above decision ie regarding (7) and (8) only.

GROUNDS FOR THE COURT'S DECISION

Legal provisions

[11] The question of law posed by the plaintiff can be determined by reference to and the interpretation and proper application of the following legal provisions:

Order 45 r 3 of the ROC provides:

> Enforcement of judgment for possession of immovable property (O.45, r.3)
>
> 3. (1)Subject to these Rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means:
>
> (a) a writ of possession;
>
> (b) in a case in which rule 5 applies, an order of committal.
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without leave of the Court except where the judgment or order was given or made in a charge action to which Order 83 applies.
>
> (3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has

received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

(4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

Section 7 of the Specific Relief Act 1950 ('the SRA') provides:

Recovery of specific immovable property

7. (1)Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

(2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

(3) In subsection (2) 'occupier' means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

Section 234 of the National Land Code ('the NLC') provides:

Power of forfeiture

234. (1) Every lease, sub-lease or tenancy exempt from registration, whether granted before or after the commencement of this Act, shall subject to any express provision therein to the contrary, be liable to forfeiture if the lessee, sub-lessee or tenant for the time being —

(a) breaches any of the provisions thereof, express or implied;

(b) is adjudicated bankrupt; or

(c) being a company, goes into liquidation.

(2) The forfeiture of any lease, sub-lease or tenancy may be enforced by the person or body for the time being entitled to the reversion thereon either by re-entry onto the land or by action in the Court, but subject in the former case to the provisions of any other written law for the time being in force.

The plaintiff's contentions

[12] The plaintiff relied on O 45 r 3 of the ROC and contended that a writ of possession is required before the defendant can recover vacant possession of the premises owned by him and which were occupied by the plaintiff. In this

case, the defendant did not apply for leave of the court for a writ of possession to be issued to enable him to enforce the judgment.

[13] The plaintiff further contended that under s 7(2) of the SRA, when the tenancy was determined or had come to an end, and if the plaintiff, as occupier, continues to remain in occupation of the property, then the person who is entitled to possession of the property, ie the defendant, shall not enforce his right to recover the property unless by proceedings in court, namely, by getting a court order. In this case, the defendant did not get such a court order.

[14] In relation to s 234(2) of the NLC, the plaintiff further contended that even if the defendant wishes to re-enter the land, such re-entry is subject to other written law in force, namely, O 45 r 3 of the ROC and s 7(2) of the SRA, which still means that the defendant requires a court order or a writ of possession before entering into the premises occupied by the plaintiff.

The defendant's contentions

[15] On the other hand, the defendant contended that a writ of possession under O 45 r 3 of the ROC is not required in this case since he is proceeding under s 234(2) of the NLC. The defendant stated that the plaintiff was in arrears of payment of rental and judgment had been given against the plaintiff. The judgment was duly served on the plaintiff. A notice in accordance with cl 4(a) of the tenancy agreement was given to the plaintiff on 25 February 2011 (exh LWK3). The plaintiff was required to pay the outstanding rental at the material time within seven days failing which the defendant would re-enter the land and forfeit the rental deposit.

[16] Clause 4(a) of the tenancy agreement, inter alia, provides that if the rent is in arrears or unpaid for more than 14 days by the tenant, it shall be lawful for the landlord to re-enter upon the demised premises and thereupon the term of the tenancy shall absolutely determine.

[17] In this case, the tenancy has already been determined. The defendant could therefore exercise his rights under s 234(2) of the NLC for re-entry onto the land.

The Court's interpretion of the legal provisions

[18] There are various ways for the defendant, as owner of the premises, to enforce the judgment in order to recover possession of the premises. Should the defendant elect to enforce the judgment for possession of immovable property under O 45 r 3 of the ROC, then the defendant is required to obtain the leave of the court first, followed by the issue of the writ of possession.

[19] Order 45 r 3(1) states that a judgment or order for the giving of possession of immovable property 'may be enforced by one or more of the following means' namely, a writ of possession, or in the case in which r 5 applies, an order of committal. It must be noted that the word used is 'may' and not 'shall'. This means that there may be more than the one or two ways provided in O 45 r 3(1)(a)–(b) of the ROC for the defendant to enforce the judgment for possession of his immovable property. It is therefore open to the defendant to elect whether to enforce the judgment under O 45 r 3 of the ROC or by other means.

[20] In this case, the defendant elected not to apply for a writ of possession under O 45 r 3 of the ROC. Instead, he elected to proceed under s 234(2) of the NLC, when the plaintiff, as tenant, had breached the provisions of the tenancy agreement by not paying rental or arrears of rental to the defendant as owner and landlord of the premises, by re-entry onto the land ie under the first limb of the said s 234(2), and not by action in court.

[21] As stated in s 234(2) of the NLC, the defendant's re-entry onto the land is subject to the provisions of any other written law for the time being in force. In this case, the other written laws which are relevant are the ROC and the SRA. Order 45 r 3 of the ROC, as I had stated earlier, does not make it mandatory for the defendant to enforce the judgment under that provision and to obtain a writ of possession. As for s 7(2) of the SRA, in my view, that provision must be read together with s 7(3) of the same Act. This means that if the tenancy is determined or has come to an end, and if the occupier continues to remain in occupation of the property lawfully, then the defendant shall not be entitled to possession of the property without court proceedings and getting a court order. However, in this case, the defendant had already obtained the judgment against the plaintiff, and the tenancy has been terminated, but the plaintiff still failed to pay the defendant the arrears of rental owed and yet continued to occupy the premises, not lawfully, but unlawfully. Therefore, since the plaintiff was not a lawful occupier at the material time under s 7(3) of the SRA, it follows that s 7(2) of the same Act cannot be invoked by her against the defendant. This means that the requirement of s 7(2) of the SRA for the person entitled to possession of the property to recover against the lawful occupier by court proceedings or by court order, does not apply at all. I therefore hold that the defendant is not required to get a court order or a writ of possession before re-entry into the premises.

[22] There was no notice of application filed by the plaintiff applying for the return of the security deposit of RM40,000 held by the defendant's solicitors as stakeholders, other than a request in the written submissions by counsel for the plaintiff for encl 19, for return of the same to the plaintiff. In the absence of a written or proper application, and unless and until my decision on 29 October

2012 is overruled by the Court of Appeal, I do not deem it fit to make any further order now for the return of the security for costs to the plaintiff. In any case, the claim for loss and damages by the plaintiff of her personal possessions has yet to be heard and disposed of by the court. The security for costs must be retained until the final outcome of the court's decision on such claim.

Order accordingly.

Reported by Kanesh Sundrum